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Nos. 16-961 and 16-1017

IN THE

Supreme Court of the United States

NICOLE A. DALMAZZI,
Petitioner,

v.

UNITED STATES,
Respondent.

LAITH G. COX, ET AL.,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Armed Forces

PETITIONERS' REPLY BRIEF

BRIAN L. MIZER
JOHNATHAN D. LEGG
LAUREN-ANN L. SHURE
Appellate Defense Counsel
Air Force Legal Operations Agency
1500 West Perimeter Road
Suite 1100
Joint Base Andrews, MD 20762

EUGENE R. FIDELL
127 Wall Street
New Haven, CT 06511

STEPHEN I. VLADECK
Counsel of Record
727 East Dean Keeton St.
Austin, TX 78705
(512) 475-9198
svladeck@law.utexas.edu

CHRISTOPHER D. COLEMAN
Defense Appellate Division
Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060

Counsel for Petitioners

May 19, 2017

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PETITIONERS' REPLY BRIEF

The government would have the Court believe, first, that these are fact-bound cases, and second, that the Civil War-era dual-officeholding ban codified at 10 U.S.C. § 973(b) is little more than a quaint legal artifact, rather than an important manifestation of civilian control over the military—itself a transcendent constitutional principle. *See, e.g.*, *Greer* v. *Spock*, 424 U.S. 828, 839 (1976). It further seeks to minimize petitioners' dual-officeholding challenge by portraying these cases as an inappropriate vehicle either because the Court lacks jurisdiction or because petitioners are not entitled to bring their claims based upon the timing of their appeals.

The government is mistaken on every count, and on most, it is in the awkward position of arguing against itself. The Questions Presented are of exceptional (and growing) importance to ongoing appeals in both the court-martial and military commissions systems; the Court of Appeals for the Armed Forces (CAAF) and the Court of Military Commission Review (CMCR) have reached incomplete and buck-passing conclusions as to how they should be answered; and further percolation is unlikely to alter the status quo. The Court can and should settle the matter now.

I. This Court Has Jurisdiction

The Court has jurisdiction because CAAF granted a petition for review in each petitioner's case. *See* Pet. 1 & n.1 (quoting 28 U.S.C. § 1259(3)); *Cox* Pet. 2 & n.1 (same).[1] The government argues that § 1259(3) "does

1. Except where otherwise indicated, citations to the "Pet." and "Pet. App." are to the filings in *Dalmazzi* (No. 16-961).

not apply here because the CAAF 'vacate[d]' its orders granting review and then 'denied' the petitions for review," Opp. 10, but this argument focuses on what CAAF *said*, rather than what it *did*. Section 1259's legislative history confirms that it is the latter that counts,[2] and here, CAAF granted petitions for review and then issue a published opinion purporting to resolve the matter. *See* Pet. App. 1a.

On the government's reading of § 1259(3), CAAF could insulate many—if not most—of its decisions from this Court's jurisdiction by vacating a grant of review at the end of any opinion, no matter how substantive. But the government itself has previously argued against the same construction of the very next clause of § 1259. *See* Reply Brief for the Petitioner at 5 n.1, *United States* v. *Denedo*, 555 U.S. 1041 (2008) (mem.), 2008 WL 4887709 (criticizing a reading of § 1259(4) that "would provide a means for the CAAF to insulate its own decisions from further review"). This Court agreed, holding that such "parsimonious" constructions of § 1259 are disfavored. *See United States* v. *Denedo*, 556 U.S. 904, 909 (2009).

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2. As the Senate Armed Services Committee explained, § 1259 separates the types of cases for which CAAF could be reviewed because "the Department of Justice recommended that direct Supreme Court review of military justice cases be limited to those *actually considered* by the Court of Military Appeals." S. REP. NO. 98-53, at 33 (1983) (emphasis added); *see also The Military Justice Act of 1982, Hearings Before the Subcomm. On Manpower & Personnel of the S. Comm. on Armed Services*, 97th Cong. 2d Sess. 21 (1982) (testimony of Hon. Robert H. Taft, IV, General Counsel, Dep't of Defense) ("[§ 1259] would authorize a petition for certiorari only in cases that actually go to the Court of Military Appeals and that are considered.").

The reading of § 1259(3) that the government would have the Court adopt reflects precisely the kind of parsimony *Denedo* condemned. Once CAAF grants a petition for review and "actually considers" a case (as it did here), this Court has jurisdiction under § 1259(3). CAAF cannot make a litigant's right to review its opinion in their case simply "go away" by vacating a grant of review at the end.[3]

II. Petitioners' Claims are Timely

The government also defends CAAF's "mootness" analysis in *Dalmazzi*. *See* Opp. 12. But CAAF's holding that Judge Mitchell (and, by implication, Judges Burton, Celtnieks, and Herring) did not serve in a "civil office" until President Obama signed their commissions is belied by both the text of § 973(b) and the Justice Department's own interpretations of that provision.

Section 973(b) is triggered when an active-duty military officer "holds" *or* "exercises the functions of" a civil office. *See* Pet. 11–12; *Cox* Pet. 10. Thus, the Justice Department has long agreed that "any objection" to occupation of such an office "could not depend upon the formality of appointment." Off. of Legal Counsel, *Applicability of 10 U.S.C. § 973(b) to JAG Officers Assigned to Prosecute Petty Offenses Committed on Military Reservations* 5 n.9 (May 17, 1983) [hereinafter "1983 OLC Memo"] (citing 14 OP. ATT'Y GEN. 200 (1873)).[4] Instead, the question is a

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3. Any lingering uncertainty over the Court's jurisdiction can be subsumed within the grant of certiorari and set for plenary briefing and argument. *See, e.g.*, *Montgomery* v. *Louisiana*, 135 S. Ct. 1546, 1546 (2015) (mem.).

4. The 1983 OLC Memo is available at https://perma.cc/YLM8-KTR6.

functional one, and there is no question that all four judges were "exercising the functions" of a CMCR judgeship at the time they decided Petitioners' appeals. *See* Pet. 11–12; *Cox* Pet. 10.

All but admitting that CAAF misread § 973(b) on this point, the government nevertheless suggests that "any error would not warrant this Court's review because the issue lacks continuing importance." Opp. 13. It is certainly true that the *timing* issue is narrow, but that can hardly be said for the merits. And "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred." *Ryder* v. *United States*, 515 U.S. 177, 182–83 (1995).

Because the government's threshold arguments against reaching the merits are unavailing, its suggestion that "these cases would not be appropriate vehicles in which to consider them even if the Court had jurisdiction," Opp. 14, falls flat. It would be one thing if CAAF had not yet reached the merits. *See* Pet. 13. But now that it has, *see United States* v. *Ortiz*, 76 M.J. 189 (C.A.A.F. 2017), a remand would be futile. If this Court has jurisdiction and the merits are worthy of certiorari, then these cases are an appropriate vehicle in which to decide them.

III. The Government's Merits Arguments Underscore the Petitions' Importance

Each of the government's "independent" statutory arguments is easily refuted. The government also misses the thrust of petitioners' constitutional objections, which only bolster the case for certiorari.

The government's first § 973(b) argument is that the Military Commissions Act (MCA) in fact *does* "authorize" the service of military officers as judges on the CMCR because § 950f(b)(2) contemplates the "assignment" of "a commissioned officer of the armed forces" to the CMCR. *See* Opp. 15–16. But Judges Burton, Celtnieks, Herring, and Mitchell are not "assigned" CMCR judges under § 950f(b)(2); they are "appointed" CMCR judges under § 950f(b)(3).

This distinction is more than semantic; as this Court has explained, the constitutionally significant difference between an "assignment" and an "appointment" in a similar provision "negates any permissible inference that Congress intended that military judges should receive a second *appointment*, but in a fit of absentmindedness forgot to say so." *Weiss* v. *United States*, 510 U.S. 163, 172 (1994) (emphasis added). Unlike § 950f(b)(2), § 950f(b)(3) says nothing about military officers at all. *See, e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

The distinction between "assigned" and "appointed" CMCR judges is also fatal to the government's similar third statutory argument, that "the office of [CMCR] judge does not 'require[] an appointment by the President by and with the advice of the Senate.'" Opp. 17. Just as Congress differentiates between the office of the Chief Justice and that of the Associate Justices, 28 U.S.C. § 1, so too the MCA creates two different "offices" of judges on the same court. When President Obama nominated

and the Senate confirmed Judges Burton, Celtnieks, Herring, and Mitchell to the CMCR, they assumed an office ("appointed judge") that, by statute, requires such nomination and confirmation—and therefore triggers § 973(b)(2)(A)(ii).

The government's contrary argument—that, facts aside, these judges can nevertheless be treated as § 950f(b)(2) assignees—raises the very Appointments Clause problem that their CMCR appointments were intended to mitigate. *See* Pet. 4–5. Unlike their CCA counterparts, CMCR judges are not "officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond* v. *United States*, 520 U.S. 651, 663 (1996). Instead, CMCR judges are answerable only to the D.C. Circuit and can be removed only for "good cause." 10 U.S.C. § 949b(b)(4)(d); *In re Khadr*, 823 F.3d 92, 98 (D.C. Cir. 2016). They are, therefore, principal officers for Appointments Clause purposes. If the MCA does not compel the conclusion that additional CMCR judges hold a civil office requiring presidential nomination and Senate confirmation, the Appointments Clause does.

The government's second statutory argument—that, per the CMCR's summary analysis in *Al-Nashiri*, "additional judges" on the CMCR do not hold a "civil office," Opp. 16–17—fares no better. OLC defines a "civil office" as "one established by statute, and . . . involv[ing] the exercise of 'some portion of the sovereign power.'" 1983 OLC Memo, *supra*, at 24. The position of "additional judge" on the CMCR is established by statute, *see* 10 U.S.C. § 950f(b)(3); and its occupants exercise "some portion of the sovereign power." *See id.* § 950f(d).

It is therefore irrelevant whether, as the CMCR held, "[d]isposition of violations of the law of war by military commissions is a classic military function." Pet. App. 23a–24a. But even if the substance of the CMCR's work were relevant, this contention rests on the CMCR's mischaracterization of *its* function, as opposed to that of trial-level military judges at Guantánamo Bay.[5] CMCR judges are Article I judges exercising the judicial power of the United States. They hold a quintessential "civil office."

The government's final statutory argument simply rehashes *Ortiz*'s flawed, superficial logic, *i.e.*, that "'[n]othing in the text [of § 973(b)] suggests that it prohibits' an officer who assumes a prohibited office 'from carrying out his assigned military duties,'" Opp. 18 (quoting *Ortiz*), and that § 973(b)(5)'s saving clause actually *immunizes* all conduct carried out by military officers after assuming a prohibited civil office. *See id.*

This interpretation misreads the plain text of the saving clause, which insulates "any action undertaken by an officer in furtherance of *assigned* official duties." 10 U.S.C. § 973(b)(5) (emphasis added). After the 1983 OLC Memo concluded that the longstanding practice of assigning military lawyers to serve as Special Assistant U.S. Attorneys (SAUSAs) to prosecute

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5. Unlike the military commissions themselves, the CMCR hears *appeals* as an Article I court of record, *see* 10 U.S.C. § 950f(a), which is not in any sense "classic." Military commissions have only been subject to direct appellate review since 2005. *See, e.g.*, *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864). Nor is it "inherently military." The CMCR includes civilian judges and has exercised jurisdiction over domestic, non-military offenses. *See, e.g.*, *Bahlul* v. *United States*, 840 F.3d 757 (D.C. Cir. 2016) (en banc) (per curiam), *petition for cert. filed*, No. 16-1307 (U.S. Mar. 28, 2017).

offenses committed by civilians on military installations violated § 973(b), Congress amended § 973(b) to narrow the scope of "civil office" to exclude SAUSAs, and to insulate the thousands of prosecutions undertaken by those "assigned" officers from legal challenge. *See Ortiz*, 76 M.J. at 192 & n.1.

In other words, the focus of § 973(b)(5) was on duties carried out by military officers in civil offices to which they had unlawfully been "assigned" under the pre-1983 version of § 973(b), such as the JAG lawyers' service as SAUSAs. Because the 1983 amendments prospectively limited the definition of "civil office" to positions generally requiring an "election" or an "appointment," the saving clause's reach was, in practice, retroactive. *See Reserve Officer Holding Civil Office*, 4 CIV. L. OP. JAG A.F. 391, 391 (Feb. 14, 1991) (holding that clause applied to insulate service in a civil office only prior to September 24, 1983—the date on which § 973(b)(5) entered into force).

The government and CAAF mistakenly read the 1983 amendments to have done much more—and to have effectively repealed § 973(b)'s prohibitions altogether. On their view, the saving clause would permit military officers to accept prohibited civil offices and continue to serve on active duty without any consequence. In addition to its inconsistency with the text and purpose of the 1983 amendments, this reading is also internally incoherent; application of the saving clause to the *military* office would be pointless if the sole penalty for violating § 973(b) were, as CAAF concluded in *Ortiz*, disqualification from the unauthorized *civil* office.

The government's argument also assumes, despite the absence of any indicia of such legislative intent,

that Congress intended to abrogate the common law doctrine of incompatibility. *See Lopez* v. *Martorell*, 59 F.2d 176, 178 (1st Cir. 1932) ("[A]n office holder was not ineligible to appointment or election to another incompatible office, but acceptance of the latter vacated the former. This rule is of great antiquity in the common law . . . ."). *But see Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.").

Not only do the text and legislative history of the 1983 amendments evince no such purpose, they point rather squarely in the opposite direction. Thus, the same section of the statute that amended § 973(b) separately authorized the President to appoint an active-duty military officer to serve as Chairman of the Red River Compact Commission, and provided that his acceptance of such an appointment "shall not terminate or otherwise affect [his] appointment as a military officer," Department of Defense Authorization Act, 1984, Pub. L. No. 98-94, § 1002(d), 97 Stat. 614, 656; *see also* S. REP. NO. 98-174, at 258 (1983).

On the government's and CAAF's reading, this proviso was wholly unnecessary. But Congress clearly disagreed, and the Department of Defense has disagreed as well; it continues to view administrative separation as the proper sanction for a violation of § 973(b) absent special circumstances not present here. *See* Political Activities by Members of the Armed Forces, Dep't of Def. Directive 1344.10 § 4.6 (Feb. 19, 2008). Thus, the appropriate remedy for the violation of § 973(b) in petitioners' cases is the nunc pro tunc

disqualification of the challenged judges from service on the CCAs. *See Ryder*, 515 U.S. at 184–85.

Any other reading of § 973(b) raises grave constitutional concerns. The government downplays those concerns by embracing *Ortiz*, which rejected a similar Appointments Clause objection because it wrongly "presumes that Colonel Mitchell's status as a principal officer on the USCMCR somehow carries over to the CCA, and invests him with authority or status not held by ordinary CCA judges." *Ortiz*, 76 M.J. at 193; *see* Opp. 20–21.

The difficulty with this line of argument is that it turns a blind eye to the possibility that the two positions might be functionally (as opposed to formally) incompatible. If an additional judge of the CMCR (as a principal officer) could serve alongside a judge on a CCA (as an inferior officer), the same logic would allow the President to nominate (and the Senate to confirm) the sitting Secretary of Defense to also serve on a CCA. But in that scenario, there is an obvious "incongruity" in having an individual with such authority (1) serving in a second position through which he is subordinate to other Executive Branch officers; while at the same time (2) sharing decision-making authority with inferior officers who may well be unduly influenced by his principal office. *See Morrison* v. *Olson*, 487 U.S. 654, 675–76 (1988) (tracing functional incompatibility to "incongruity" of overlapping functions). This concern is especially acute where, as here, the distinct offices involve overlapping personnel—and provides yet another reason for rejecting the government's and CAAF's reading of § 973(b).

The same can be said for the serious Commander-in-Chief Clause problem that arises from military officers' service on the CMCR—because CMCR judges "may be removed by the President only for cause and not at will." *Khadr*, 823 F.3d at 98. Such a constraint on the President's power raises constitutional concerns of the first order. *See* Pet. 15. The only response the government can muster is that the D.C. Circuit refused to issue a writ of mandamus on this issue in *al-Nashiri*. Opp. 20 n.6. The far better answer is to avoid the problem by reading § 973(b) the way it has always been understood by Congress and OLC.

* *

Finally, the government insinuates that *Ortiz* (in which a petition is now pending) is the better vehicle for resolution of these statutory and constitutional questions. *See* Opp. 22. Because the government is incorrect that the Court lacks jurisdiction and that petitioners' challenges were improper from the standpoint of timing, there is no reason to wait for *Ortiz*. But if concerns about the threshold issues remain, the proper course is not to deny certiorari here, but rather to grant these petitions *and Ortiz*. As the government concedes, "petitioners would not [otherwise] be entitled to relief even if this Court granted review in *Ortiz* and opted for their position on the [merits]." *Id.*

CONCLUSION

For the foregoing reasons and those previously stated, the petitions should be granted.

Respectfully submitted,

STEPHEN I. VLADECK
Counsel of Record

727 East Dean Keeton St.
Austin TX 78705
(512) 475-9198
svladeck@law.utexas.edu

BRIAN L. MIZER
JOHNATHAN D. LEGG
LAUREN-ANN L. SHURE
Appellate Defense Counsel
Air Force Legal Operations Agency
United States Air Force
1500 West Perimeter Road
Suite 1100
Joint Base Andrews, MD 20762

CHRISTOPHER D. COLEMAN
Defense Appellate Division
Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060

EUGENE R. FIDELL
127 Wall Street
New Haven, CT 06511

Counsel for Petitioners

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